Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 6, 1995

Mr. A. L. Mangham
Chair
Texas Racing Commission
P.O. Box 12080
Austin, Texas 78711-2080

Letter Opinion No. 95-042

Re: Whether, under the Texas Racing Act, V.T.C.S. art. 179e, a racetrack may pay to a horse owners' organization a percentage of the total gross monies allocated from the betting handle to the purse and related questions (ID# 19392)

Dear Commissioner Mangham:

Your predecessor asked about the authority of a racetrack under the Texas Racing Act (the "act"), V.T.C.S. art. 179e, to pay to a horse owners' organization a percentage of the total gross monies allocated from the betting handle to the purse.[1] Your predecessor advised that several pari-mutuel racetracks have contracted with the Texas Horsemen's Benevolent and Protective Association (the "THBPA"), an organization that negotiates with racetracks regarding purse schedules and other matters that concern horse owners[2] and trainers. Your predecessor stated further that a typical contract between a racetrack and the THBPA contains the following provisions:

> The racetrack shall deduct from the total gross monies allocated from the betting handle[3] to the horsemen's purse fund a sum equal to two percent (2%). . . .
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> All horsemen's monies controlled by [the racetrack] shall be deposited or invested in an interest-bearing account, or in other investments, which the THBPA considers reasonable in light of dues, available interest rates and needed liquidity of the account, as

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[1]The Texas Racing Commission's rules define "purse" as "the cash portion of the prize for a race." 16 T.A.C. § 301.1.

[2]For purposes of section 6.08, a "horse owner" is "a person who is owner of record of an accredited Texas-bred horse at the time of a race." V.T.C.S. art. 179e, § 6.08(k)(1).

[3]Your predecessor advised that a "handle" is the total amount of money wagered at a racetrack during a particular period. *See also* 16 T.A.C. § 301.1.

> directed by the THBPA. Monies derived as interest from these investments will be received by the THBPA to be used for horsemen as the THBPA may determine. In addition to the two percent (2%) provided for in Paragraph 4 of this agreement, these monies (interest) will be paid to the THBPA no later than the 10th of each month. . . .
>
> [The racetrack] agrees that THBPA is the exclusive representative of horsemen at [the racetrack]. Through this contractual arrangement, THBPA shall receive two percent (2%) of total gross monies, allocated to the purse fund, as set forth in Paragraph 4 of this agreement for expenses and benevolence. Any horseman wishing not to participate must sign a form with the horsemen's bookkeeper to be excluded from all deductions and benefits. . . .
>
> In the event a horse owner who has won purse money at the racetrack properly indicates in writing to THBPA that the horse owner does not agree with the THBPA arrangement, THBPA will pay the horse owner the sum of two percent (2%) of the purse sum won by the horse owner.[4] [Footnotes added.]

Section 6.08 of the act specifically provides for deductions from the wagering pool.[5] In pertinent part, section 6.08 provides as follows:

> (a) An amount shall be deducted from each wagering pool to be distributed as provided by Subsections (b) through (e) of this section. The total maximum deduction from a regular wagering pool is 18 percent. . . .
>
> (b) A horse racing association shall set aside for purses an amount not less than seven percent of a live regular wagering pool . . . .
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> . . . .
>
> (*l*) An association may not make a deduction or withhold any percentage of a purse from the account into which the purse paid to a horse owner is deposited for membership payments, dues,

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[4]In addressing your question, we are not expressing an opinion on these, or any other, particular contract provisions.

[5]We believe "wagering pool," as section 6.08 uses the term, is synonymous with "pari-mutuel pool." The act defines "pari-mutuel pool" as the total amount of money racetrack patrons wager on the result of a particular race or combination of races, which is divided into separate mutuel pools for win, place, show, or combinations. V.T.C.S. art. 179e, § 1.03(19); *see also* 16 T.A.C. § 301.1.

> assessments, or any other payments to an organization except an organization of the horse owner's choice.[6] [Footnote added.]

The legislature added subsection (*l*) to section 6.08 in 1991. *See* Act of May 18, 1991, 1991, 72d Leg., R.S., ch. 386, § 29, 1991 Tex. Sess. Law Serv. 1454-56. We found no legislative history indicating the legislature's motivation or intent in enacting the subsection.

Section 6.08(*l*) of the act authorizes a racetrack to withhold a percentage of a purse to deposit for payments to an organization of the horse owner's choice. In our opinion, section 6.08(*l*) therefore authorizes a racetrack to execute a contract with the THBPA to pay to the THBPA two percent of the amount section 6.08(b) requires the racetrack to set aside for the purse, but only if the horse owner who is to receive the purse has chosen to have the money withheld from his or her account and paid to the THBPA. We are unaware of any other law that would preclude such a payment.

Your predecessor next asked whether the contract violates the act by requiring the racetrack to pay to the THBPA all interest from the accounts containing the portion of the wagering revenue that section 6.08(b) of the act dedicates to the purse. The act contains no provisions either permitting or prohibiting such an arrangement; nor does the act contain any provisions otherwise dedicating that interest income. Furthermore, we are unaware of any other law that would preclude the payment of interest income from the purse account to the THBPA.

If the interest income is part of the racetrack owners' discretionary revenue, they may use the interest income as they wish, including contracting to pay the interest income to the THBPA. On the other hand, if the money in the accounts belongs to the THBPA at the instant the racetrack owner deposits the money, the THBPA is entitled to the interest income. In either event, we see nothing that precludes the racetrack owners from contracting to pay to the THBPA all interest from the accounts containing the portion of the wagering revenue that section 6.08(b) dedicates to the purse.

Finally, your predecessor asked whether the contract violates the act by providing that a horse owner may opt out of the contractual arrangement by so informing the horsemen's bookeeper or the THBPA in writing. As your predecessor indicated, the prototype of the contract between the THBPA and racetrack owners states, "Any

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[6]Your predecessor explained that, when a horse owner elects to race his or her horse at a racetrack, the horse owner establishes an account with the horsemen's bookkeeper. If the owner's horse finishes in the money in a race, the appropriate portion of the purse for that race is credited to the horse owner's account and the bookkeeper automatically deducts jockey mount fees for the race. Aside from deductions to an organization pursuant to section 6.08(*l*) of the act, your predecessor stated that a bookkeeper is to make no other automatic deductions from the account except with the horse owner's express consent.

horseman wishing not to participate must sign a form with the horsemen's bookkeeper to be excluded from all deductions and benefits." The prototype further states that a horse owner who has won purse money but who does not agree with the contractual arrangement must notify the THBPA in writing to receive "two percent . . . of the purse sum" the horse owner won.

Section 6.08(*l*), V.T.C.S. article 179e, forbids a racetrack from withholding any percentage of a purse paid to a horse owner for payments to an organization unless the organization is "of the horse owner's *choice*." (Emphasis added). In our opinion, the legislature meant, by the use of the term "choice," to require a horse owner actively and affirmatively to decide whether to have a percentage of his or her winnings withheld and given to a particular organization. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 235-36 (1990) (defining "choice" as "the act of choosing"). We do not believe the opt-out arrangements described in the contract provide a horse owner with the kind of active, affirmative decision the legislature intended. We thus conclude that the contractual opt-out provision violates section 6.08(*l*).

Your predecessor's final question implicates one other issue that we wish to address. Specifically, your predecessor suggested that the THBPA contract may violate section 6.08(*l*) by providing that, if a horse owner who has won purse money opts out of the contractual arrangement, the THBPA will pay to the horse owner two percent of the amount he or she already has received as winnings, instead of the amount necessary to give the horse owner the entire purse. In other words, as we understand it, from a purse of $100, the racetrack owner withholds an amount equal to two percent of the purse, or $2, for deposit into the THBPA account. The horse owner then receives $98. If the horse owner opts out of the THBPA contractual arrangement, the THBPA pays the horse owner two percent of $98, or $1.96; the horse owner does not receive two percent of $100.

Section 6.08(*l*) prohibits a horse racing association from withholding any percentage of a horse owner's purse unless the horse owner has chosen to permit it. In our opinion, the arrangement authorized by the THBPA contract violates section 6.08(*l*) by withholding from the horse owner a percentage of the purse that he or she has not authorized to be withheld. In the example we have set forth above, the THBPA withholds from the horse owner 0.04% of the purse. That this amount may be minimal is irrelevant; on its face, section 6.08(*l*) does not permit it. To the extent the THBPA contract authorizes the withholding of money from a horse owner without the horse owner's consent, the contract contravenes section 6.08(*l*) of the act.

Whether the presence of provisions we have determined to be unlawful invalidates the entire contract is a matter of contractual construction; thus, the issue is not amenable to the opinion process. *See* Attorney General Opinions DM-192 (1992) at 10 (stating that this office does not construe contracts); JM-697 (1987) at 6 (same).

SUMMARY

Section 6.08(*l*) of the Texas Racing Act (the "act"), V.T.C.S. article 179e, authorizes a racetrack to pay to a horse owners' organization a percentage of the total gross monies allocated from the betting handle to the purse, but only if the horse owner who is to receive the purse has chosen to have money deducted from his or her account and paid to the Texas Horsemen's Benevolent and Protective Association (the "THBPA"). Additionally, nothing in the act prohibits a racetrack from contracting to pay the THBPA all interest from the accounts containing the portion of the wagering revenue that section 6.08(b) of the act dedicates to the purse.

Section 6.08(*l*) of the act forbids a racetrack from withholding any percentage of a purse paid to a horse owner for payments to an organization unless the organization is of the horse owner's *choice*. The term "choice" implies that a horse owner is entitled actively and affirmatively to decide whether to have a percentage of his or her winnings withheld and given to a particular organization. A contractual provision providing that a horse owner may opt out of having a percentage of his or her winnings withheld and given to the THBPA violates section 6.08(*l*).

Section 6.08(*l*) also prohibits a racetrack from executing a contract under which a horse owner who chooses to abstain from participation in the THBPA is not reimbursed for the total amount of money withheld from the purse. To the extent that the THBPA contract authorizes the withholding of money from a horse owner without the horse owner's consent, the contract contravenes section 6.08(*l*) of the act.

Whether the presence of the unlawful provisions invalidates the entire contract is a matter of contractual construction.

Yours very truly,

Kymberly K. Oltrogge

Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee